

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Southwest Power Pool, Inc.

Docket No. ER05-666-003

ORDER DENYING REHEARING

(Issued December 19, 2005)

1. In this order we deny Golden Spread Electric Cooperative, Inc.'s (Golden Spread) request for rehearing in *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100 (2005) (July 21 Order). In the July 21 Order the Commission accepted in part, conditionally accepted in part, and rejected in part proposed revisions to the Southwest Power Pool, Inc. (SPP), Open Access Transmission Tariff (OATT). The proposed revisions principally address generation-load imbalance service, limited liability and indemnification provisions, monthly demand charges and zone transmission load, network-integration transmission service, and optional reservation processing for short-term firm transmission service. Golden Spread's request for rehearing addresses only the Commission's decision concerning certain limited liability and indemnification provisions accepted in the July 21 Order.

Background

July 21 Order

2. The July 21 Order, among other things, conditionally approved proposed revisions to the limited liability and indemnification sections contained in the SPP OATT, and directed a further compliance filing.¹ For purposes of the instant rehearing request, the relevant proposed sections are SPP OATT sections 10.2, 10.3, and 10.5.

Rehearing Request

3. Golden Spread asserts that the Commission erred because it approved sections of the SPP OATT that insulate SPP and/or its transmission owners (TO) from responsibility for their ordinary negligence and in some cases require that transmission customers indemnify SPP or its TOs if liability is imposed. According to Golden Spread, these

¹ On November 15, 2005, in an unpublished letter order, the Director, Division of Tariffs and Market Development-Central accepted the compliance filing.

provisions: (1) reduce the incentive to exercise an appropriate level of care when transmission service is provided and transmission facilities are maintained; (2) shift liability for SPP's and its TOs' negligence to innocent persons; and (3) favors risk shifting and indemnification in lieu of insurance for risk mitigation.

4. Golden Spread also argues that the Commission did not provide a reasoned explanation for its departure from its decision in *Northeast Utilities Service Company*, 111 FERC ¶ 61,333 (2005) (*Northeast Utilities*), which, among other things, upheld the Commission's rejection of a proposed indemnification provision.² Golden Spread also asserts that the Commission erred when it did not adequately explain why it limited this protection to SPP and its TOs.

Discussion

5. Golden Spread's request raises no new arguments nor does it present new evidence that would persuade us to grant rehearing and to reject the proposed revisions that address liability and indemnification issues.

Limited Liability

6. Golden Spread objects to section 10.2³ because this provision insulates SPP and its TOs from the economic consequences that arise from ordinary negligence, which Golden Spread asserts, causes most of the injuries. According to Golden Spread, this

² In that proceeding, the Commission summarily rejected the proposed indemnification provision but accepted and suspended the remainder of the proposed revisions to the *Northeast Utilities' OATT*, to become effective subject to refund. *See, Northeast Utilities Service Company*, 105 FERC ¶ 61,089 (2003).

³ Proposed section 10.2 states:

10.2 Liability: The Transmission Provider shall not be liable for money damages or other compensation to any Transmission Customer or Users for actions or omissions by the Transmission Provider or Transmission Owner in performing its obligations under this Tariff or any Service Agreement thereunder, except to the extent such act or omission by the Transmission Provider is found to result from its gross negligence or intentional wrongdoing. A Transmission Owner shall not be liable for money damages or other compensation to any Transmission Customer or Users for actions or omissions by such Transmission Owner or Transmission Provider in performing its obligations under this Tariff or any Service Agreement thereunder, except to the extent such act or omission by such Transmission Owner is found to result from its gross negligence or intentional wrongdoing. . . .

section shifts the burden to transmission customers who are not responsible for the damaging activity (or inactivity) and who are ill suited to mitigate the risk of that burden.⁴ Golden Spread also argues that section 10.2 removes any incentive for SPP and its TOs to avoid negligent conduct and to exercise the appropriate level of care in the course of conducting their affairs.⁵

7. We remain unconvinced by Golden Spread's reiterated arguments. The Commission already addressed Golden Spread's concern about who should bear the burden of costs that arise as a consequence of SPP's or its TOs' ordinary negligence. In the July 21 Order the Commission said:

With regard to section 10.2 (Liability), we find the gross negligence and intentional wrongdoing standard to be just and reasonable for several reasons. As noted in [*Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 727 (D.C. Cir. 2000)] prior to unbundling, many state commissions had approved retail tariff provisions permitting utilities to limit their liability for service interruptions to instances of gross negligence or willful misconduct. (footnote omitted) Courts found that such provisions balance lower rates for all customers against the burden of limited recovery for some, and that the technological complexity of modern utility systems and resulting potential for service failures unrelated to human errors justify liability limitations. (footnote omitted) We agree. SPP and its TOs are solely regulated by the Commission for their provision of transmission services under the SPP OATT, so the Commission is the only regulator with the ability to ensure that they are protected from potentially excessive damage awards by adequate limitation of liability provisions. (footnote omitted) [*See Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164 at P 29 (2005) (*MISO*).] Several state commissions in SPP's footprint allow utilities to limit their liability to gross negligence. (footnote omitted) We believe that SPP and its TOs should be afforded similar protection. . . . [*Id.*]

July 21 Order at P 36.

8. The Commission also pointed out that the risk of potentially excessive damage awards would be reflected in higher insurance premiums and higher capital costs and in turn be borne by customers and that this could result in inequities among customers.

⁴ Golden Spread Rehearing at 2.

⁵ *Id.* at 3.

Thus, the Commission concluded that strong limited liability provisions could help protect customers from rates increased to recover these excessive damage awards.⁶

9. We remain convinced that sufficient safeguards exist that discourage negligent activities by SPP and/or its TOs. For example, in the post August 14, 2003 blackout environment, all RTOs, ISOs, ITCs and other TOs are being held more accountable for the reliable operation of the nation's transmission systems so that the risk of a significant event occurring is minimal and the economic consequences involved become more manageable. The North American Electric Reliability Council (NERC) has responded to this challenge by developing a comprehensive set of clear and enforceable standards, Version 0 Reliability Standards. On February 8, 2005, the NERC Board of Trustees approved the Version 0 Reliability Standards that became effective April 1, 2005. In an order issued February 9, 2005,⁷ the Commission reaffirmed its support for the new reliability standards and clarified that the term "Good Utility Practice," as used in the *pro forma* OATT,⁸ includes compliance with NERC standards or more stringent regional reliability council standards. Accordingly, public utilities that own, control, or operate their systems in accordance with Good Utility Practice as set forth in the *pro forma* OATT, include compliance with NERC's Version 0 Reliability Standards. We believe that these standards provide sufficient incentive for SPP and its TOs to perform services without resorting to a standard of ordinary negligence for liability.

Indemnification

10. Golden Spread asserts that the Commission erred when it accepted section 10.3⁹ that requires SPP transmission customers to indemnify SPP and/or its TOs for liability

⁶ *Id.* at P 37.

⁷ *Supplement to Policy Statement on Matters Related to Bulk Power System Reliability*, 110 FERC ¶ 61,096 (2005) (*Supplemental Policy Statement*).

⁸ The *pro forma* OATT was adopted in *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,812 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group, v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom., New York v. FERC*, 535 U.S. 1 (2002).

⁹ Proposed section 10.3 states:

10.3 Indemnification: The Transmission Customer shall at all times indemnify, defend, and save the Transmission Provider and Transmission
(continued...)

due to ordinary negligence. Golden Spread argues that this decision is inconsistent with *Northeast Utilities* because in that case the Commission rejected a proposed provision that would adopt a “gross negligence” standard for indemnification.

11. Golden Spread’s reliance on *Northeast Utilities* is misplaced. In *Northeast Utilities*, the Commission rejected a proposed indemnification provision that included a “gross negligence” standard because it was unsupported on the record.¹⁰ The Commission denied rehearing of this issue pointing out that Order No. 888, as affirmed in Order No. 888-A, provided that the customer will not be required to indemnify the transmission provider in the case of negligence or intentional wrongdoing by the transmission provider.¹¹ At first glance it appears that *Northeast Utilities* supports Golden Spread’s arguments, however *Northeast Utilities* (and more recently, *Southern Company*) does not involve an RTO/ISO.¹² It is Commission policy to permit broader

Owner(s) harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the Transmission Provider’s or Transmission Owner’s(s) performance of obligations under the Tariff on behalf of the Transmission Customer, except in cases of gross negligence or intentional wrongdoing by the Transmission Provider or a Transmission Owner. If the Transmission Provider engages in gross negligence or intentional wrong doing, but the Transmission Owner(s) does (do) not, that will not affect the indemnification of the Transmission Owner(s) under this section 10.3 and vice-versa. . . .

¹⁰ See, *Northeast Utilities*, 105 FERC ¶ 61,089 at P 26.

¹¹ See *Northeast Utilities*, 111 FERC ¶ 61,333 at P 26, citing Order No. 888 at 31,765.

¹² The Commission rejected proposed amendments to Southern Company Services, Inc.’s (Southern Company) OATT that, among other things, limited liability that would protect and/or indemnify the Southern Companies for any damages due to service interruptions other than those caused by “gross negligence” or “intentional misconduct”. The Commission rejected these amendments because they were not as Southern Company argued, similarly situated to RTOs like Midwest ISO, SPP, and ISO-NE. The Commission noted that it extended this limitation on liability and indemnification to RTO/ISOs because they were created and solely regulated by the Commission, and otherwise would be without limitations on liability. The Commission noted that the Southern Company did not demonstrate why applicable state laws did not provide adequate protection. See, *Southern Company Services Inc.*, 113 FERC ¶ 61,239 at P 7 (2005).

indemnification protection in the RTO/ISO context. Accordingly, we find that the proposed indemnification provision is consistent with Commission policy and that *Northeast Utilities*, a non-RTO proceeding, is not controlling here.

Recovery of Indemnification Paid by SPP

12. Golden Spread also objects to the Transmission Provider Recovery provision (section 10.5),¹³ which permits SPP to recover through Schedule 1 any amounts it may be required to pay due to its indemnification of another party. Golden Spread argues that SPP's status as a non-profit organization may serve as a reason to allow it to recover indemnification costs to the extent that recovery is appropriate, but that status does not justify SPP being able to receive dollar-for-dollar recovery when it must reimburse other entities for damages occasioned by its gross negligence or willful misconduct. Golden Spread asserts that SPP could utilize an insurance program as a means to hedge such risks.¹⁴

13. Golden Spread's argument is not persuasive. Golden Spread's objection to section 10.5 is in essence a restated attack on the limitation of liability contained in section 10.2. Since we continue to believe that the limitation on liability in section 10.2 is appropriate, there is no reason to change the mechanism through which the indemnification can occur. As the Commission pointed out in the July 21 Order: "[A]nother RTO, RTO-NE, [is allowed to] pass on indemnification costs to all market participants on a rolled-in basis under its administrative services and capital funding tariffs. (footnote omitted) [*ISO New England, Inc.*, 109 FERC ¶ 63,015 at P 191 (2004)] Essentially, the same result would be achieved here through section 10.5." July 21 Order at P 43.

14. We also note that, contrary to Golden Spread's assertion, SPP's proposed liability and indemnification provisions do not conflict with Commission precedent. In fact, in

¹³ Proposed section 10.5 states:

10.5 Transmission Provider Recovery: To the extent SPP is required to pay any money damages, amounts, or compensation due to its indemnification of any other party, it will be allowed to recover such amounts (subject to crediting all amounts it recovers through insurance or through any indemnification it receives) under Schedule 1, of its OATT as part of the Administrative Charges, provided that the cap in Schedule 1, section 1, does not apply to or prohibit the recovery of such amounts.

¹⁴ Golden Spread Rehearing at p 4.

the RTO/ISO context, similar broad provisions are contained in OATTs that are already on file.¹⁵ Therefore, in light of the discussion herein, we will deny Golden Spread's request for rehearing.

The Commission orders:

Golden Spread's request for rehearing is hereby denied for the reasons stated in the body of this order.

By the Commission. Commissioner Kelly dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁵ See ISO New England, FERC Electric Tariff No. 3, section 1.5.2 (Liability) and section 1.5.3 (Indemnification). See also, New York Independent System Operator, Inc., FERC Tariff, Original Volume No. 2, section 12.3 (Limitation on Liability) and section 12.4 (Indemnification) (each of the sections contain the "gross negligence" or "intentional misconduct" standard).

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Docket No. ER05-666-003

(Issued December 19, 2005)

KELLY, Commissioner, *dissenting*:

For the same reasons noted in my partial dissent on the July 21, 2005 order in this proceeding, I object to the Commission's approval of SPP's tariff revisions exempting SPP and its TOs from liability, except in cases of gross negligence or intentional wrongdoing; and requiring SPP's transmission customers to indemnify SPP and its TOs, except in cases of gross negligence or intentional wrongdoing. I share the concerns raised here by Golden Spread Electric Cooperative, Inc. and would have granted rehearing with respect to approving SPP's limitation on liability and indemnification provisions. Therefore, I respectfully dissent from this order.

Suedeem G. Kelly